Supreme Court, U.S.
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No. 95-1113

In The

Supreme Court of the United States

October Term, 1995

STELWAGON MANUFACTURING COMPANY,

Petitioner,

v.

TARMAC ROOFING SYSTEMS, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF RESPONDENT TARMAC ROOFING SYSTEMS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

In a private antitrust action under the Robinson-Patman Act, "the only evidence directly linking the Robinson-Patman violation to any decline in [petitioner's] sales and profits" was "anecdotal evidence of its customer's [out-of-court] statements, admitted under the state of mind hearsay exception, to establish that it actually lost sales." App. 15a, 38a-39a. The Court of Appeals held that this was improper under settled principles of evidence law. The questions presented for review, none of which are significant antitrust issues, and none of which warrant a grant of *certiorari*, are:

1. Whether the Court of Appeals acted properly in vacating the award of damages because of the District Court's erroneous reliance on hearsay.

2. Whether the Court of Appeals decision is also proper because petitioner failed to offer any evidence of even one lost sale, any witnesses or documents from the favored purchasers, any witnesses or documents from its own alleged lost customers, or evidence showing the prices charged by the favored purchasers.

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Respondent Tarmac Roofing Systems, Inc. ("Tarmac") respectfully requests that this Court deny the petition of Stelwagon Manufacturing Company ("Stelwagon") for a writ of certiorari to review the unanimous decision of the United States Court of Appeals for the Third Circuit ("Third Circuit") in *Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc.*, 63 F.3d 1267 (3d Cir. 1995), *rev'g*, 862 F. Supp. 1361 (E.D. Pa. 1994).[1]

COUNTERSTATEMENT OF THE CASE

From 1987 until 1992, Tarmac manufactured modified asphalt products ("MAPs" or "modifieds") at its facility in Chester, Pennsylvania. Tarmac sold MAPs to distributors, like Stelwagon, who in turn sold the MAPs to roofing contractors. Complaint at ¶ 11. Tarmac also sold MAPs to other manufacturers who resold the MAPs to distributors under their own label.

The undisputed evidence at trial showed that Tarmac sold MAPs to at least fourteen other distributors in Philadelphia, the four surrounding Pennsylvania counties of Delaware, Bucks, Chester and Montgomery, and the adjacent New Jersey counties of Camden, Gloucester and Burlington. Each of these distributors paid the same prices as Stelwagon.

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[1] Pursuant to Supreme Court Rule 29.6, Tarmac represents that it has no subsidiaries and is a wholly owned subsidiary of Permanite, Inc., a Delaware corporation, which is wholly owned by Tarmac PLC, a publicly owned corporation existing under the laws of the United Kingdom.

Throughout the relevant time period, various problems plagued Stelwagon. Unlike its competitors, it had a unionized workforce and multiple locations, which, according to its vice president and general manager, resulted in higher overhead costs than its competition. Moreover, in 1988, three key, high-ranking employees were terminated in an embezzlement scandal and around that time, Stelwagon abandoned plans to open additional warehouses.

Stelwagon contended that Tarmac violated section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), and that it was entitled to treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15, because Tarmac sold private label MAPs to Celotex Corporation ("Celotex"), one of the largest building materials manufacturers in the United States, and Standard Roofing Company ("Standard"), another distributor, at prices which were lower than those Tarmac charged Stelwagon for MAPs. Stelwagon also contended that it competed with both Celotex and Standard, which had a warehouse in Trenton, New Jersey.

At trial, Stelwagon failed to offer any evidence of a single lost sale or customer. Stelwagon failed to offer any witnesses, documents or invoices from Standard or Celotex, evidence from even one customer who supposedly purchased Tarmac MAPs from Standard or Celotex instead of Stelwagon or even evidence showing the prices charged by Standard and Celotex for Tarmac MAPs.

Instead, in an attempt to prove actual antitrust injury, Stelwagon introduced, as the District Court itself acknowledged, only "the anecdotal evidence of its customer's statements, admitted under the state of mind hearsay exception, *to establish that it actually lost sales to*

Celotex and Standard." Stelwagon, 862 F. Supp. at 1368, App. at 38a-39a (emphasis added and citations omitted).

A unanimous panel of the Third Circuit reversed.[2] The Court stated the self-evident proposition that "[s]tatements that are considered under the exception to the hearsay rule found at Fed.R.Evid. 803(3), commonly referred to as the 'state of mind' exception, cannot be offered to prove the truth of the underlying facts asserted." *Stelwagon*, 63 F.3d at 1274, App. at 12a (footnote and citations omitted).

The Third Circuit further concluded that the District Court did not limit the use of the hearsay testimony as the rule required, but rather used it improperly as proof of antitrust injury:

> it is clear from the district court's opinion disposing of Tarmac's motion for judgment as a matter of law, that the court considered the customer statements for a purpose beyond which they were originally, and properly, admitted:
>
> > "Stelwagon[ ] introduced . . . the anecdotal evidence of its customer statements, admitted under the state of mind exception, *to establish that it actually lost sales to Celotex and Standard.*"

Stelwagon, 63 F.3d at 1274, App. at 12a-13a (quoting *Stelwagon*, 862 F. Supp. at 1368; brackets, ellipses and emphasis in original; citations omitted). Accordingly, the

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[2] The Third Circuit subsequently denied rehearing. Judges Becker, Stapleton and Mansmann dissented without explanation from the denial of rehearing. *Stelwagon*, 63 F.3d at 1279, App. 47a-48a.

Third Circuit held that "[b]ecause the statements properly could not have been admitted in the first instance as proof of the fact of the matter asserted, we believe the district court's reliance on them as proof of actual antitrust damages, in the form of lost sales, was in error." *Stelwagon*, 63 F.3d at 1274-75, App. at 13a (footnote omitted).

Stelwagon also tried to fill the evidentiary void at trial through its expert witness. However, nothing in the expert's testimony demonstrated any connection between Stelwagon's "decline in sales and profits" and the Robinson-Patman violation. The only evidence of such a link was "the anecdotal testimony of Stelwagon employees that, as discussed above, should not have been admitted as proof of lost sales [and] profits." *Stelwagon*, 63 F.3d at 1275, App. 15a. As the Third Circuit further observed, "[n]ot only did Stelwagon fail to offer any documentary evidence as to the effect of the discrimination on resale prices, it also failed to identify a single lost customer." *Stelwagon*, 63 F.3d at 1275-76, App. at 15a (footnote omitted).

For his part, and without any evidentiary foundation in the record, Stelwagon's expert assumed that Stelwagon's sales of MAPs "should have" grown at the same rate as sales of other products, and that, if the sales of MAPs did not grow at that rate, then the cause must have been price discrimination:

> "But for the price advantage of other distributors, we assume that Stelwagon's sales of MAPs would have followed a pattern similar to Stelwagon's sales of other products (excluding MAPs). For this reason, we use Stelwagon's

> sales of other products to forecast the sales of MAPs. From this forecast, we then calculate the lost sales of MAPs in the years following 1988."

Stelwagon, 63 F.3d at 1275, App. at 13a-14a (quoting report of Stelwagon's expert; ellipses omitted).

Stelwagon's expert offered no support for his assumptions. He failed to identify the "other products" to which he compared Stelwagon's MAPs sales and could not explain why the sales of these products could be used to forecast Stelwagon's MAPs sales. He also did not consider whether Stelwagon's sales of Tarmac MAPs declined because of competition from fourteen distributors with which Stelwagon admitted it competed and which did not receive favorable prices from Tarmac. He completely disregarded whether an embezzlement scheme and termination of several key Stelwagon employees in late 1988 subsequently affected Stelwagon's sales. He also did not consider whether Stelwagon's higher overhead could have affected its sales. Moreover, even though Stelwagon contended that only two of its warehouses competed with Standard, it only offered evidence of an alleged drop in its company-wide sales.

Significantly, in conducting his analysis, Stelwagon's expert reviewed only Tarmac's invoices and failed to review any invoices or documents from Celotex or Standard. Consequently, although he considered the prices charged by Tarmac *to* Celotex and Standard, he had no idea of the prices charged *by* Celotex and Standard. Finally, as noted above and perhaps most significantly, Stelwagon's expert failed to determine whether even a

single Stelwagon customer actually transferred its business to Standard or Celotex. He reviewed nothing from any of Stelwagon's customers.

Accordingly, the Third Circuit concluded that the analysis of Stelwagon's expert was fatally flawed:

> Significantly, Dr. Perry's analysis failed to sufficiently link any decline in Stelwagon's MAPs sales to price discrimination. The sales may have been lost for reasons apart from the price discrimination – reasons that Dr. Perry's analysis apparently did not take into account. For example, the evidence showed that Stelwagon had higher overhead costs than its competitors. In addition, there was undisputed evidence that Stelwagon experienced other business complications during the relevant time period. In 1988, for example, Stelwagon terminated a vice-president, two territorial managers and three key employees for their part in an embezzlement scheme.

Stelwagon, 63 F.3d at 1275, App. at 14a-15a.

Although the Third Circuit recognized that "[i]f some of [plaintiff's] injury was attributed to the price discrimination, [the defendant] is responsible to that extent," *Stelwagon*, 63 F.3d at 1275, App. at 15a (citation omitted and brackets in original), it held that Stelwagon never proved that it was injured by price discrimination. As discussed above, the Third Circuit concluded that Stelwagon failed to prove antitrust injury because "the only evidence directly linking the Robinson-Patman violation to any decline in sales and profits Stelwagon may have experienced is the anecdotal testimony of Stelwagon

employees that, as discussed above, should not have been admitted as proof of lost sales profits." *Stelwagon*, 63 F.3d at 1275, App. at 15a.

Circuit Judge Garth filed a concurring opinion agreeing that Stelwagon failed to prove actual antitrust injury and that "Stelwagon's antitrust verdict cannot stand." *Stelwagon*, 63 F.3d at 1277, App. at 19a (Garth, J. concurring). However, Judge Garth wrote separately to express his conclusion that Stelwagon also failed to prove that it was in competition with Celotex and that even if it had proved actual antitrust injury it "failed to quantify its damages adequately." *Id.* at 1277-78, App. at 20a-21a.

SUMMARY OF ARGUMENT

This Court has repeatedly stressed that even where a plaintiff proves its *prima facie* case under section 2(a) of the Robinson-Patman Act, it must demonstrate that it suffered *actual* damages *caused by* the defendant's price discrimination in order to be entitled to treble damages under section 4 of the Clayton Act. Stelwagon utterly failed to satisfy this requirement.

In an attempt to prove actual antitrust injury, Stelwagon only offered "the anecdotal evidence of its customer's statements, admitted under the state of mind hearsay exception, to establish that it actually lost sales to Celotex and Standard." *Stelwagon*, 862 F. Supp. at 1368, App. at 38a-39a (citations omitted). However, as a unanimous panel of the Third Circuit properly concluded, statements admitted under the state of mind exception "cannot be offered to prove the truth of the underlying

facts asserted." *Stelwagon*, 63 F.3d at 1274, App. at 12a (citations omitted).

Moreover, Stelwagon offered no testimony or other evidence from any alleged lost customer. Stelwagon offered no testimony or other evidence from either of the two favored purchasers. Stelwagon also failed to offer any evidence showing the prices charged by the favored purchasers or to whom they sold. Accordingly, the Third Circuit properly held that Stelwagon failed to prove actual antitrust injury and could not recover treble damages under section 4 of the Clayton Act.

REASONS FOR DENYING THE WRIT

I. THE OUT-OF-COURT CUSTOMER STATEMENTS OFFERED BY PETITIONER AT TRIAL COULD NOT BE USED TO PROVE ACTUAL ANTITRUST INJURY

Both the Third Circuit and the District Court recognized that Stelwagon only offered "the anecdotal evidence of its customer's statements, admitted under the state of mind hearsay exception, *to establish that it actually lost sales to Celotex and Standard.*" *Stelwagon*, 862 F. Supp. at 1368, App. at 38a-39a (emphasis added and citations omitted); *see Stelwagon*, 63 F.3d at 1274, 1275, App. at 12a, 15a. Accordingly, the Third Circuit properly reversed because statements admitted under the state of mind exception "cannot be offered to prove the truth of the underlying facts asserted." *Stelwagon*, 63 F.3d at 1274, App. at 12a (citations omitted).

The Third Circuit's holding is supported by the decisions of every other court which has ruled on this issue. *See TK-7 Corp. v. Estate of Barbouti*, 993 F.2d 722, 729 (10th Cir. 1993) (affirming directed verdict in defendants' favor: "the document contains hearsay and cannot serve as evidence that the plaintiff lost profits. . . . Accordingly, any suggestion that the [document] demonstrates lost profit damages with any reasonable certainty is untenable"); *Grove Fresh Distributors, Inc. v. New England Apple Products Co.*, 969 F.2d 552, 556 (7th Cir. 1992) (testimony, admitted under the state of mind exception, from plaintiff's employees as to customers' statements "cannot be offered to prove [defendant] in fact underpriced [plaintiff]. The statements are admissible only for showing a customer's motives for no longer dealing with a supplier.").[3] The Second Circuit, in an opinion authored by Judge Friendly, specifically held that a plaintiff could not establish actual antitrust injury through testimony admitted under the state of mind exception: "Statements of a customer as to his reasons for not dealing with a supplier are admissible for this limited purpose [state of mind], although not as evidence of the facts recited as furnishing the motives." *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906, 914 (2d Cir.) (citations omitted), *cert. denied*, 369 U.S. 865 (1962).

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[3] *See also Hunters Internat'l Mfg. Corp. v. Christiana Metals Corp.*, 561 F. Supp. 614, 617 (E.D. Mich. 1982) (granting defendant's JNOV motion, court held that hearsay could not be used to prove lost profits), *aff'd*, 725 F.2d 683 (6th Cir. 1983); *Certified Laboratories v. Rubinson*, 303 F. Supp. 1014, 1025-26 (E.D. Pa. 1969) (lost profits could not be proven through hearsay testimony).

Stelwagon has failed to cite a single case in which a court concluded that a plaintiff proved actual antitrust injury through hearsay like that offered by Stelwagon. The single case relied upon by Stelwagon, *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524 (3d Cir. 1990), *cert. denied*, 499 U.S. 921 (1991), Petition at 25-28, actually contradicts its argument.

In *Feeser*, the district court had entered summary judgment in favor of defendant. The Third Circuit reversed concluding that the plaintiff had offered sufficient evidence of actual antitrust injury to avoid summary judgment because of "(a) the *direct evidence* of lost sales . . . [and] (b) the evidence that the substantial price discrimination reflected in the resale prices of [plaintiff] and the favored competitors directly resulted in [plaintiff] losing certain sales and losing profits on other sales because it had to cut its margins." 909 F.2d at 1540. The "direct evidence" offered by the plaintiff consisted of testimony from several of its customers that they purchased from the favored competitors whose prices were lower. *Feeser*, 909 F.2d at 1537. This was in stark contrast to Stelwagon, which did not present the testimony of even a single customer.

For example, the plaintiff in *Feeser*, unlike Stelwagon, presented the testimony of an employee of one of its largest customers that for a five month period plaintiff's prices were consistently higher than those of the favored purchaser and that if plaintiff had not subsequently lowered its prices it would have lost his employer's business. 909 F.2d at 1537. Plaintiff presented the testimony of another customer that "when he wished to purchase portion-controlled products, [the relevant product,] he

would place his order with [the favored purchaser] because [plaintiff's] prices . . . were much higher." *Id.* Stelwagon presented no such testimony.

Moreover, contrary to Stelwagon's representation, *Feeser* does *not* stand for the general proposition that hearsay evidence can be used to prove actual antitrust injury at trial. In *Feeser*, the Third Circuit held that such testimony could only be used as evidence of the state of mind of the disfavored purchaser's customers and *not* as evidence of the underlying facts: " 'statements of a customer as to his reasons for not dealing with a supplier are admissible for this limited purpose' . . . *but not as evidence of the facts recited as furnishing the motives.*" 909 F.2d at 1535 n.11 (emphasis added and quoting *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906, 914 (2d Cir. 1962)). In fact, the Third Circuit stressed that out of court statements could only be used to prove the truth of the matter on summary judgment "if the out-of-court declarant could later present the evidence through direct testimony." *Feeser*, 909 F.2d at 1542.

The Third Circuit's ruling that Stelwagon could not prove actual antitrust injury through "the anecdotal evidence of its customer's statements, admitted under the state of mind hearsay exception, to establish that it actually lost sales to Celotex and Standard" is consistent with the decisions of every court which has ruled on the issue. Accordingly, Stelwagon's Petition should not be granted.

II. THE THIRD CIRCUIT PROPERLY CONCLUDED THAT PETITIONER FAILED TO PROVE ACTUAL ANTITRUST INJURY BECAUSE IT FAILED TO OFFER ANY EVIDENCE OF EVEN ONE LOST SALE, ANY WITNESSES OR DOCUMENTS FROM THE FAVORED PURCHASERS OR ANY EVIDENCE SHOWING THE PRICES CHARGED BY THE FAVORED PURCHASERS

At trial, Stelwagon only offered the "anecdotal evidence of its customer's statements, admitted under the state of mind hearsay exception, to establish that it actually lost sales to Celotex and Standard." *Stelwagon*, 862 F. Supp. at 1368, App. at 38a-39a (citations omitted). Stelwagon offered no testimony or other evidence from any alleged lost customer or from Celotex or Standard. Stelwagon also failed to offer any testimony or other evidence showing the prices charged by Celotex or Standard. In the absence of such evidence, Stelwagon's expert testimony was fatally flawed and the Third Circuit properly concluded that Stelwagon failed to prove actual antitrust injury because "the only evidence directly linking the Robinson-Patman violation to any decline in sales and profits Stelwagon may have experienced is the anecdotal testimony of Stelwagon employees that, as discussed above, should not have been admitted as proof of lost sales' profits." *Stelwagon*, 63 F.3d at 1275, App. at 15a.

In an attempt to manufacture an issue worthy of this Court's attention, Stelwagon contends that the Third Circuit ignored this Court's precedent when it held that Stelwagon, which did not offer any evidence of even one lost sale, failed to prove actual antitrust injury. Petition at 8-23. However, Stelwagon ignores this Court's holding

that a plaintiff is *not* entitled to "automatic damages" upon proving its case under section 2(a):

> To recover treble damages, then, a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent. It must prove more than a violation of § 2(a), since such proof establishes only that injury *may* result.

J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562 (1981) (emphasis in original and citation omitted). Moreover, this Court specifically held that in order to obtain treble damages a plaintiff "must, of course, be able to show a causal connection between the price discrimination in violation of the Act and the injury suffered." *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (1969).

Texaco, Inc. v. Hasbrouck, 496 U.S. 543 (1990), on which Stelwagon relies, Petition at 16-17, also supports the Third Circuit's decision. In *Texaco*, plaintiffs, who were retailers of gasoline in Spokane, Washington, complained that Texaco had granted two distributors, Dompier and Gull, both of which also operated as retailers in that city, substantial discounts which enabled the distributors and their customers to undercut the plaintiffs' prices in the citywide competitive market for gasoline. 496 U.S. at 549-50. Significantly, the plaintiffs in *Texaco* offered the type of evidence that Stelwagon utterly failed to offer, namely evidence of the prices charged by the favored purchasers. There was evidence that the first favored distributor, Gull, priced the gasoline at its stations a penny less than the prevailing price for major brands, *id.* at 549, and that the second favored distributor, Dompier, and its customers priced their gasoline at a price "barely

above" that charged by Texaco to plaintiffs, *id.* at 550-51. Moreover, to the extent the distributors sold to independent retailers which competed with plaintiffs, the evidence showed that the two distributors passed their favorable prices along to those retailers. *Id.* at 553 n.10. Stelwagon offered no such evidence.

In *Texaco*, the Court held that proof of the specific *amount* of damages could be less precise than proof of the fact of actual antitrust injury and that plaintiffs' expert testimony adequately estimated the *amount* of damages. 496 U.S. at 572.[4] The Court never held that plaintiffs' expert testimony adequately established the *fact* of actual antitrust injury. To the contrary, the Court explained that plaintiffs "introduced evidence describing the diversion of their customers to specific stations supplied by Dompier" to support a finding of actual antitrust injury. 496 U.S. at 571. Specifically, unlike Stelwagon, plaintiffs offered substantial direct evidence of actual antitrust injury:

> Here, the plaintiffs presented substantial evidence to show that the injuries they suffered were precisely the type that would result from unlawful price discrimination and that they

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[4] In the portion of the Court's opinion relied upon by Stelwagon, the Court dealt with Texaco's contention that the damages award with respect to Gull was excessive and improperly based on an extrapolation from data applicable only to Dompier because plaintiffs "offered no direct testimony of any diversion to Gull." *Texaco*, 496 U.S. at 572. The Court rejected this argument because "Texaco's theory improperly blurs the distinction between the liability and damages issues" and proof of the specific amount of damages need be less precise. *Id.*

> flowed from the anti-competitive conduct. Several of them testified as to diverted sales and lost profits; *there was documentary evidence of increases in Dompier's sales volume over the same time period.* Plaintiffs also testified that they would have recouped the lost revenues had they received a price break on their purchases of gasoline from Texaco. *In addition, former customers testified that they had switched service stations because of the lower prices charged by stations supplied by Dompier or Gull.*

Hasbrouck v. Texaco, Inc., 842 F.2d 1034, 1042-43 (9th Cir. 1987) (emphasis added and footnote omitted), *aff'd*, 496 U.S. 569 (1990).

Perkins v. Standard Oil Co., 395 U.S. 642 (1969), also relied upon by Stelwagon, Petition at 18, likewise supports the Third Circuit's decision. In *Perkins*, the issue was whether the Robinson-Patman Act covered injuries to competition between plaintiff and the customer of the customer of the favored purchaser, *i.e.*, "fourth level" competition. 395 U.S. at 646-47. The Court found that plaintiff established actual antitrust injury with respect to this fourth level competition because there was evidence that the price advantage was passed down to plaintiff's ultimate competitor who in turn undercut plaintiff's prices. *Id.* at 649. However, Stelwagon offered no evidence of the prices charged by Standard or Celotex or whether they undercut Stelwagon's prices.

Falls City Indus. v. Vanco Beverage, Inc., 460 U.S. 428 (1983), also cited by Stelwagon, Petition at 22-23, further supports the decision of the Third Circuit. In *Falls City Indus.*, the plaintiff established competitive injury

through *"direct evidence of diverted sales,"* including witnesses' testimony of sales to purchasers, testimony of actual purchasers who had bought from the favored purchasers and evidence of advertising by the favored purchasers in plaintiff's market area. 460 U.S. at 437-38 & n.8 (emphasis added).[5]

Unlike the plaintiffs in *Texaco, Perkins* and *Falls City Indus.*, Stelwagon utterly failed to present any evidence of actual antitrust injury. Stelwagon only introduced "the anecdotal evidence of its customer's statements, admitted under the state of mind hearsay exception, to establish that it actually lost sales to Celotex and Standard." *Stelwagon*, 862 F. Supp. at 1368, App. at 38a-39a (citations

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[5] In the present case, if it had been injured, Stelwagon could have easily proved actual antitrust injury through testimony or other evidence from either Celotex or Standard, or any one of its allegedly lost customers. This it utterly failed to do and, accordingly, could not recover treble damages. By contrast, the other cases on which Stelwagon relies, *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969) and *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), Petition at 18-21, did not involve price discrimination claims. In those cases, which involved conspiracies to monopolize, the plaintiff proved actual antitrust injury by comparing its sales before and after the conspiracy to its sales during the conspiracy or by comparing its sales in the market affected by the conspiracy to its sales in other markets. *Bigelow*, 327 U.S. at 264-65; *Zenith*, 395 U.S. at 123-25; *Continental Ore*, 370 U.S. at 697 & n.7. Such evidence was found sufficient because of "the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts." *Zenith*, 395 U.S. at 123.

omitted). The Third Circuit's decision that Stelwagon failed to prove actual antitrust injury is fully consistent with the decisions of this Court. This Court has never held that a plaintiff which fails to offer any evidence of a single lost customer and fails to offer any evidence from the favored purchasers is entitled to treble damages. Accordingly, Stelwagon's Petition should not be granted.

CONCLUSION

For the foregoing reasons, Respondent Tarmac Roofing Systems, Inc. respectfully requests that the Court deny Stelwagon's petition for writ of certiorari.

Respectfully submitted,

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